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Supreme Court, U.S.
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No. (D)

# In The
# Supreme Court of the United States

MAUREEN RAYNOR,

*Petitioner,*

v.

UNITED STATES DISTRICT COURT,
DISTRICT OF NEBRASKA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Eighth Circuit erred by not issuing a mandamus to end the usurpation of judicial power by two American courts that felt at liberty to disregard this Court's Rule of Law, the Default Rule (requiring the application of the Standard Rule in regard to limitation statutes), adopted in a series of decisions cumulating in *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson,* 545 U.S. 409, 125 S. Ct. 2444, 2550-51 (2005), and to decide for themselves, without reference to this Court's antecedent principles.

## PARTIES TO THE PROCEEDING

Petition sought the issuance of a writ of mandamus to review the decision of the Honorable Richard G. Kopf, United States District Court Judge for the District of Nebraska, sitting as an appellant court for the United States Bankruptcy Court for the District of Nebraska. Richard D. Myers, Trustee ("Trustee") in the Chapter 7 bankruptcy proceeding of John P. Raynor ("Debtor"), the Appellee in the District Court proceeding did enter an appearance in the request for Writ of Mandamus since the request was denied without opinion on January 4, 2008.

## DISCLOSURE STATEMENT

Counsel for the Petitioner is the husband of the Petitioner and the Debtor in the bankruptcy case.

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## OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit entered the judgment on January 4, 2008 denying the Writ of Mandamus without opinion. The decision of the United States District Court sitting as an appellant court is reported as an unpublished opinion in Westlaw as *In re Raynor*, (No. 8:07CV151) 2007 WL 4180713, D. Neb., 2007 and is reprinted in Appendix "A" to the Petition. The Bankruptcy Court's decision is unpublished and is reprinted in Appendix "B" to the Petition ("Pet. App.").

## JURISDICTION

The Court of Appeals denied the writ for Mandamus on January 4, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

This case involves a Federal limitations statute in a bankruptcy case: 11 U.S.C. § 546(a). The statute provides: "An action or proceeding . . . may not be commenced . . . later . . . [than] 2 years after the entry of the order for relief."

## STATEMENT OF THE CASE

The Petitioner filed for the issuance of a writ for mandamus by the Eighth Circuit seeking the narrowest possible relief, to wit:

1. To direct the District Court to discharge its duty (legal charge) by addressing the extensive Supreme Court precedent cited in Petitioner's briefs in support of the Default Rule which mandates the application of the Standard Rule for limitations periods as adopted in *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson,* 545 U.S. 409, 125 S. Ct. 2444, 2550-51 (2005).

2. If thereafter, the District Court departs from the foregoing precedent, to support its departure by special justification.

3. For the Eighth Circuit to address the confusion created by the adoption of two Rules of Law regarding limitation statutes which are mutually exclusive; that is, the Rule of Law (Standard Rule/ Traditional Rule) adopted in *Mattson v. U.S. West Communications, Inc.,* 967 F.2d 259, 262 (8th Cir. 1992), and the Rule of Law (Modern Rule) adopted in *Moore v. U.S.*, 173 F.3d 1131 (8th Cir. 1999).

The Bankruptcy Court and District Court, in their decisions on the limitations period, applied the Modern Rule, also known as the "*Lamb Doctrine.*" *Union Nat'l Bank of Wichita Kan. v. Lamb*, 337 U.S. 38, 69 S. Ct. 911, 93 L.Ed. 1190 (1949). The Modern Rule relies, not upon the language of the limitation

statute, but upon the rules of civil procedure. Fed. R. Civ. Proc. 6(a) or Fed. R. Bankr. Proc. 9006(a) serves as the legal foundation to create a gap period between the accrual of the action and the commencement of the limitation period thus making an anniversary date filing timely.

## A. Factual Background.

There were no factual disagreements between the Parties. All the necessary facts are set forth in Section B below. The District Court correctly stated in page 2 of its memorandum and order, that:

> The parties agree that the question in this appeal is "whether the 'triggering event' commences the running of the two-year statute of limitations, or whether the statute of limitations commences the day after the day of the 'triggering event.'" *In re Raynor*, (No. 8:07CV151) 2007 WL 4180713, D. Neb., 2007.

This is an issue of law. As to that issue of law, the Trustee, in his brief to the United States District Court, acknowledged that this Court applied the Traditional Rule in *Graham County Soil*.

## B. Proceedings Below

The proceedings that precipitated the requested relief are:

1. The "triggering event" of the applicable limitations statute in four of the five counts was Debtor's bankruptcy filing ("Debtor's Filing") on September 13, 2004.

2. The Trustee was appointed on June 3, 2005.

3. The Trustee filed his Adversary Complaint against Petitioner, Maureen Raynor, on September 13, 2006, the second anniversary of Debtor's Filing.

4. The Federal limitation statute at issue, 11 U.S.C. § 546(a)(1)(A), is two (2) years for four out of five counts alleged in the Trustee's Adversary Complaint.

5. In lieu of an Answer to the Trustee's Adversary Complaint, the Petitioner filed her Original Motion to Dismiss the action as time-barred on November 6, 2006. The Motion was based on the application of the Standard Rule/Traditional Rule as mandated through adoption of the Default Rule in *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson,* 545 U.S. 409, 125 S. Ct. 2444, 2550-51 (2005).

6. On January 28, 2007, the Bankruptcy Court denied Petitioner's Original Motion to Dismiss and failed to consider and/or address the legal principle of *Stare Decisis* in context of the Supreme Court authority cited in Petitioner's briefs.

7. Petitioner filed a Motion for Reconsideration with the Bankruptcy Court on February 5, 2007, asking that the Court address the Default Rule and the Supreme Court precedent.

8. The Bankruptcy Court denied Petitioner's Motion for Reconsideration without opinion on March 27, 2007.

9. The Petitioner filed an Appeal to the District Court on April 5, 2007, pursuant to 28 U.S.C. § 158(a)(3).

10. On Appeal to the District Court by order dated April 26, 2007, the Petitioner was required to brief the jurisdictional issues applying the standards of 28 U.S.C. § 1292(b). The Petitioner argued that the Bankruptcy Court ignored Supreme Court precedent that was dispositive of the issue.

11. After District Court's July 5, 2007 Order exercising the Court's discretion to hear the Appeal, Petitioner and Trustee/Appellee briefed the issue.

12. On November 21, 2007, the District Court denied Petitioner's appeal and affirmed the Bankruptcy Court order.

13. In its Memorandum of Law, the District Court failed to consider and/or address the legal principle of *Stare Decisis* in context of the Supreme Court authority cited by Petitioner. There is no evidence in the District Court's Memorandum Opinion that Supreme Court precedent was raised by Petitioner as authority for Petitioner's position.

14. In the Eighth Circuit, appeals from District Court decisions on bankruptcy court interlocutory orders is not permitted.

15. On December 17, 2007, the Petitioner filed the Writ of Mandamus pursuant to 28 U.S.C. § 1651 with the Eighth Circuit Court of Appeals because the District Court and Bankruptcy Court failed to consider and address the legal principle of *Stare Decisis* in context of the Supreme Court authority cited by Petitioner.

16. On January 4, 2008, the Eighth Circuit denied the request for Mandamus without opinion.

On the date set forth below, Petitioner sought relief in the form of this writ.

## REASONS FOR GRANTING THE PETITION

The extra-ordinary circumstances involved in this case are that two American courts felt at liberty to disregard this Court's Default Rule (which requires the application of the Standard Rule in regard to limitation statutes) and to decide for themselves, without reference to this Court's antecedent principles. The Default Rule was adopted in a series of Supreme Court decisions cumulating in *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson,* 545 U.S. 409, 125 S. Ct. 2444, 2550-51 (2005).

Petitioner sought the mandamus for the limited purpose of directing the District Court to address Supreme Court precedent as required pursuant to Constitution, Article VI, clause 2, and pursuant to 28 U.S.C. § 453, their oath of office. Through

pretermission a lower court cannot: (i) ignore Supreme Court's precedent and (ii) depart from Supreme Court's precedent without special justification. The mandamus was for the purpose of confining an inferior court to a lawful exercise of its prescribed jurisdiction. Petitioner has a clear and indisputable right to have a rule of law established by the Supreme Court applied to the case.

## I. The Default Rule

The Standard Rule/Traditional Rule provides that a cause of action accrues and the statute of limitation commences at the same time. The legal birthing process that resulted in the opinion in *Graham County Soil* makes it clear and indisputable that:

(i) The Default Rule requires the application of the Standard Rule to "all" Federal limitation statutes; and

(ii) Such application of the Default Rule is 'mandatory' unless specific language of the statute expressly provides otherwise.

The Default Rule changed the paradigm: it is no longer permissible to resort to outside authority on the premise that the language of the limitation statute is ambiguous.

Adherents to the Modern Rule go outside the language of the limitation statute and rely on Fed. R. Civ. Proc. 6(a), or in a bankruptcy case, Fed. R.

Bankr. Proc. 9006(a) to create a one-day-gap period between the day the cause of action accrued and the day the limitation statute commences to run. Other applications of the Modern Rule add additional time when a limitation period ends on a weekend or holiday. This one-day-gap period makes anniversary date filings timely. Procedural Rules, that do not apply until a case is filed, are used under the Modern Rule to revive an otherwise stale statute.

How does a court apply the Modern Rule in light of the Default Rule? The court either (i) is uninformed about *Graham County Soil* or (ii) pretermits the Default Rule. In this case, there was extensive briefing of the Default Rule and each of the cases mentioned in *Graham County Soil*. The District Court and the Bankruptcy Court both issued opinions without any evidence that the Supreme Court precedent was even considered.

Petitioner acknowledges that had the District Court misapplied the Standard Rule to the facts a mandamus action would be improper. However, in this case both the Bankruptcy Court and District Court departed from Supreme Court precedent. No special justification for the departure was cited because the courts did not acknowledge the Supreme Court precedent. Whatever reason one ascribes to the action of the Bankruptcy Court and the District Court, it is not in accord with the premise of our legal system that 'justice is blind' as set forth in the Equal Protection Clause of the U.S. Constitution: Const.

Amend. XIV, as applied to the Federal Government through Const. Amend. V.

This case is important because it is in congruence with the purpose of mandamus: to confine lower courts to their lawful jurisdiction and for higher courts to exercise their supervisory authority to insure lower courts apply law and not make law. This case deals with the fundamental workings of our judicial system – its integrity. A lower court should not be allowed to bestow upon itself jurisdiction by ignoring Supreme Court precedent.

## II. Maturation of this Principle of Law and a Judicial Schism

The maturation process of the Standard Rule at the Supreme Court has been long and finally culminated in the Default Rule in 2005. This is the recent case history:

| Year Decided | Case Citation |
|---|---|
| 1993 | *Reiter v. Cooper*, 507 U.S. 258, 267, 113 S. Ct. 1213 |
| 1997 | *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201, 118 S. Ct. 542. |
| 2001 | *TRW Inc. v. Andrews*, 534 U.S. 19, F. 6 at 34, 122 S. Ct. 441, 151 L.Ed.2d 339 – the Majority's opinion. |

2001 *TRW Inc. v. Andrews,* 534 U.S. 19, at 35, 122 S. Ct. 441, Justice Scalia's opinion concurring in judgment.

2005 *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson,* 545 U.S. 409, 125 S. Ct. 2444, 2550-51.

2005 *Dodd v. U.S.*, 545 U.S. 353, 125 S. Ct. 2478, Justice Stevens' opinion dissenting.

By the time this writ is submitted to this Court it would have been over fifteen (15) years since the Supreme Court, in recent history, first addressed the Standard Rule in 1993. At this time, the Standard Rule/Traditional Rule is the law in the Supreme Court of the United States but the Modern Rule is the law of virtually every Circuit. **Why?**

In none of the above cited Supreme Court cases does this Court mention the Modern Rule in any of its opinions. Further, this Court has never held that the rule of law in *Graham County Soil* overrules any of the lead cases that adopt the Modern Rule.

Our judicial system has an impermissible schism: one rule prevails at the Supreme Court and another rule prevails in most of the Circuits. The multi-tiered judicial system cannot tolerate this schism. The Equal Protection Clause requires that the Rule of Law adopted by the Supreme Court be, and is, the law of the land.

This case is important because it will reduce the maturation period for the Default Rule and eliminate the schism. Petitioner has a clear and indisputable

right to the application of a Supreme Court Rule of Law.

### III. Miscellaneous Reasons

In *Chase Securities Corporation v. Donaldson*, 325 U.S. 304, at 314; 65 S. Ct. 1137 (1945), this court held:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. . . . They represent a public policy about the privilege to litigate. (Citations omitted).

The Eighth Circuit has held that "strict adherence to such limitations periods "is the best guarantee of evenhanded administration of the law." *Union Pacific R. Co. v. Beckham*, 138 F.3d 325 (8th Cir. 1998).

Limitation statutes are public policy when the right to litigate has ended. In this case, the right to litigate ended and a court should not be able to set aside public policy by flouting a Rule of the Supreme Court.

"The purpose of the Bankruptcy Code is to provide the honest debtor with a 'fresh start'." 1 Bankruptcy Practice Handbook § 6:30 (2d ed.). The Petitioner has not only suffered through Debtor's bankruptcy but now must be subjected to the expense of a trial and if a judgment be had, appeals to at least

the Eighth Circuit in order to potentially have the Rule of law decided in *Graham County Soil* applied to dispose of the litigation. This occurs not because the Court misapplied a rule of law but because it chose to, in a bankruptcy setting, ascribe itself jurisdiction it does not have by ignoring dispositive Supreme Court precedent placed before it.

Both the public policy reasons behind the Congressional adoption of limitation statutes as well as the fresh start purpose of the bankruptcy code augment the reasons why this Court should grant the requested relief.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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**APPENDIX A**

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

**No: 07-3919**

**In re: Maureen Raynor,**

**Petitioner**

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Appeal from District of Nebraska – Omaha
(8:07-cv-00151-RGK)

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**JUDGMENT**

Petition for writ of mandamus has been considered by the court and is denied.

January 04, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

/s/ Michael E. Gans

## APPENDIX B

2007 WL 4180713

United States District Court, D. Nebraska.
In re John P. RAYNOR, Debtor.
Richard D. Myers, Trustee of the John P. Raynor Chapter 7 Bankruptcy Estate, Appellee/Plaintiff,
v.
Maureen Raynor, Appellant/Defendant.
**No. 8:07CV151.**
**No. BK04-83112.**
**Adv. No. A06-8105.**

Nov. 21, 2007.

Alan E. Pedersen, McGill, Gotsdiner Law Firm, Omaha, NE, for Appellee/Plaintiff.

Elizabeth M. Callaghan, William L. Biggs, Jr., Gross, Welch Law Firm, Omaha, NE, for Appellant/Defendant.

### MEMORANDUM AND ORDER

RICHARD G. KOPF, District Judge.

This is an interlocutory appeal filed by the appellant/defendant, Maureen Raynor, from orders that were entered by the bankruptcy court denying her motion to dismiss the Trustee's adversary complaint and her motion for rehearing. Ms. Raynor has elected to have this appeal heard by the district court (filing 4). After briefing on the issue of whether this court has jurisdiction to entertain the appeal, and subsequent briefing on the merits of this appeal, this matter is now ripe for

disposition. (Filing 13, Order Granting Leave to Appeal & Setting Briefing Schedule.)

## BACKGROUND

On September 13, 2004, John P. Raynor ("Debtor") filed a voluntary petition in the United States Bankruptcy Court for the District of Nebraska, seeking the entry of an order for relief under Chapter 11 of the United States Bankruptcy Code. (Filing 3-2, Docket Sheet from U.S. Bankruptcy Court, District of Nebraska, Case No. BK04-83112.)An order of relief was entered on September 13, 2004.[1] On June 2, 2005, the bankruptcy court issued an order converting the case to a Chapter 7 proceeding, and the Trustee was appointed a day later. (*Id.*) On September 13, 2006 – the second anniversary of the Debtor's voluntary petition filed in bankruptcy court – the Trustee filed an adversary proceeding against Maureen Raynor, the wife of the Debtor, the purpose of which was to avoid alleged preferential transfers in violation of § 547 of the Bankruptcy Code, other transfers pursuant to § 544 of the Code and the Nebraska Uniform Fraudulent Transfer Act, and unauthorized post-petition transfers. The Trustee's adversary complaint consisted of five causes of action – four involving alleged pre-petition transfers, and one involving

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[1] "In a voluntary bankruptcy case, the date that the petition is filed is the date of the entry of an order for relief." 3 *Bankruptcy Litigation* § 16:49 (July 2007)

alleged post-petition transfers. (Filing 155, U.S. Bankruptcy Court, District of Nebraska, Case No. BK04-83112; Filing 1, U.S. Bankruptcy Court, District of Nebraska, Case No. A06-8105.)

Maureen Raynor filed a motion to dismiss the adversary proceeding as untimely pursuant to the two-year statute of limitations, 11 U.S.C. § 546(a), which provides in relevant part:

> (a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of –
>
> (1) the later of –
>
> (A) 2 years after the entry of the order for relief;

Ms. Raynor argued that the limitations period ran on September 12, 2006, and the adversary complaint was filed one day later, September 13, 2006, which was the second anniversary of the filing of Debtor's voluntary petition in bankruptcy court.

The bankruptcy court denied the motion to dismiss, finding:

> Based upon the statutory interpretation procedure identified as appropriate by the Eighth Circuit Court of Appeals, and based upon the expressed Congressional intent that 11 U.S.C.

> § 546(a)(1) is not jurisdictional, Rule 9006(a)[2] is properly applied in the computation of time that the Trustee must abide by when bringing an avoidance action. In this case, Rule 9006(a) would permit the Trustee to begin the count on the day following the petition date and end the count on the anniversary date of the petition filing. Following that counting procedure, the Trustee's filing of the complaint on September 13, 2006, is timely.

(Filing 15, U.S. Bankruptcy Court, District of Nebraska, Case No. A06-8105, Memorandum on Motion to Dismiss Adversary Proceeding at 4.) The bankruptcy court denied Ms. Raynor's motion to reconsider this ruling in a "text-only order." (*Id.*, Docket Sheet, Filing 20.) This appeal followed.

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[2] Rule 9006, in relevant part, provides:

> In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or *by any applicable statute*, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

*Id.* (italics added).

The parties agree that the question in this appeal is "whether the 'triggering event' commences the running of the two-year statute of limitations, or whether the statute of limitations commences the day after the day of the 'triggering event'". (Filing 13, at 2.)

## DISCUSSION

"'When a bankruptcy court's judgment is appealed to the district court, the district court acts as an appellate court and reviews the bankruptcy court's legal determinations de novo and findings of fact for clear error.'" *In re Falcon Products, Inc.*, 497 F.3d 838, 840-41 (quoting *In re Fairfield Pagosa, Inc.*, 97 F.3d 247, 252 (8th Cir.1996)). After a de novo review of the bankruptcy court's legal findings, I shall deny Maureen Raynor's appeal from the bankruptcy court's orders denying her motion to dismiss the Trustee's adversary complaint and her motion for rehearing.

For the reasons thoroughly and clearly stated in Judge Mahoney's order denying Maureen Raynor's motion to dismiss, I agree that "if the Eighth Circuit Court of Appeals had before it the question of whether Rule 9006(a) should be applied to 11 U.S.C. § 546(a), it would first determine whether § 546(a) was jurisdictional or, alternatively, simply a statute of limitations.[3] If it determined the statute was not

[3] As explained in Judge Mahoney's order, the Eighth Circuit Court of Appeals has applied Fed.R.Civ.P. 6(a), a time-computation

(Continued on following page)

jurisdictional, the counting would start per Rule 9006(a) on the day following the date the petition was filed, and end on the anniversary date of the petition filing," thus making the Trustee's adversary complaint timely.

I find that, if confronted with the issue in this appeal, the Eighth Circuit Court of Appeals would align itself with the majority of courts that have addressed the applicability of Rule 9006(a) to 11 U.S.C. § 546(a) and the legislative history behind the 1994 amendments to § 546(a) to conclude that § 546(a) is not jurisdictional. *See In re Pugh,* 158 F.3d 530 (11th Cir.1998) (limitations period in 11 U.S.C. § 546(a) is waivable statute of limitations subject to estoppel and equitable tolling, not jurisdictional bar); *In re General Creations, Inc.,* 343 B.R. 548 (Bankr.W.D.Va.2006) (Bankruptcy Rule 9006(a) governs computation of time to take action prescribed by 11 U.S.C. § 546); *In re Art & Co., Inc.,* 179 B.R. 757 (Bankr.D.Mass.1995) (Rule 9006 applies to computation of time in 11 U.S.C. § 546(a)); *In re Southern Technical College, Inc.,* 172 B.R. 253 (Bankr.E.D.Ark.1994) (applying Rule 9006(a) to two-year limitations period in 11 U.S.C. § 546; finding that date on which bankruptcy

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statute similar to Bankruptcy Rule 9006(a), when a statute of limitations was not jurisdictional because Fed.R.Civ.P. 82 prevents the use of the Rules of Civil Procedure to extend the jurisdiction of United States district courts. *Moore v. United States,* 173 F.3d 1131, 1134 (8th Cir.1999) ("before determining whether we should apply Rule 6(a) to the one-year time limit in § 2255, we must first determine whether that time limit is jurisdictional").

petition was filed was excluded from two-year period in deciding whether avoidance proceeding was timely); *In re Sutera*, 157 B.R. 519, 523 (Bankr.D.Conn.1993) (Rule 9006(a) is "applicable in full, and without exception, to all provisions of the Bankruptcy Code, and . . . Rule 9006(a) shall apply to Code § 546(a)"); *In re Amdura Corp.*, 142 B.R. 433, 435 (Bankr.D.Colo.1992) ("an abundance of case law in other circuits" supports idea that Rule 9006(a) applies to calculation of two-year statute of limitations in 11 U.S.C. § 546(a); "Congress did not say that [Bankruptcy Rule 9006(a)] was to apply to statutes only if they were procedural or only if they did not confer jurisdiction. The rule is not so limited. The intent was that the rule apply to all applicable statutes. To find otherwise would require a determination that Congress did not mean what it said."). *See also* H.R. Rep. 103-835, P.L. 103-394, Bankruptcy Reform Act of 1994, *available at* 1994 WL 562232, at *50-51, or 1994 U.S.C.C.A.N. 3340, at 3358 (Oct. 4, 1994) ("Section-by-Section Analysis"; Discussion of Section 217, "Limitation of Avoiding Powers") ("This section clarifies section 546(a)(1) of the Bankruptcy Code. . . . The time limits are not intended to be jurisdictional and can be extended by stipulation between the necessary parties to the action or proceeding."); 2 Bankruptcy Desk Guide § 17:55 (Aug.2007), *available at* Westlaw Database BDR-BDG § 17:55 (time limits in 11 U.S.C. § 546(a) were not intended to be jurisdictional, but a true statute of limitations; "The Bankruptcy Rules provide that in computing any period of time prescribed or allowed by any applicable statute, the day of the act,

event, or default from which the designated period of time begins to run is not included. . . . This Rule has been applied to the computation of the limitations period in 11 U.S.C.A. § 546(a).").

Because 11 U.S.C. § 546(a) is not jurisdictional, the time-computation rules of Bankruptcy Rule 9006(a) apply,[4] and calculation of the limitations period in 11 U.S.C. § 546(a) would begin on the day following the date the petition was filed – September 14, 2004 – and end on the anniversary date of the petition filing – September 13, 2006 – making the Trustee's September 13, 2006, filing of the adversary proceeding against Maureen Raynor timely. Accordingly, I shall deny Maureen Raynor's appeal from the bankruptcy court's orders denying her motion to dismiss the Trustee's adversary complaint and her motion for rehearing.

IT IS ORDERED:

1. The appeal filed by defendant/appellant Maureen Raynor is denied;

2. The bankruptcy court's orders denying Maureen Raynor's motion to dismiss (Filing 15, U.S. Bankruptcy Court, District of Nebraska, Case No.

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[4] One could convincingly argue that Rule 9006 applies – regardless of how 11 U.S.C. § 546(a) is characterized – because by its own terms, Rule 9006 applies to "any applicable statute."

A06-8105, Memorandum on Motion to Dismiss Adversary Proceeding) and motion to reconsider (*Id.*, Docket Sheet, Filing 20) are affirmed;

3. Judgment shall be entered by separate document.

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## APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

| | |
|---|---|
| IN THE MATTER OF: JOHN PATRICK RAYNOR, Debtor(s). | CASE NO. BK04-83112 A06-8105 CH. 7 |
| RICHARD D. MYERS, Trustee of the John P. Raynor Chapter 7 Bankruptcy, Plaintiff, v. MAUREEN RAYNOR, Defendant. | |

ORDER

Hearing was held in Omaha, Nebraska on December 21, 2006, regarding Filing No. 8, Motion to Dismiss Adversary Proceeding, filed by Maureen Raynor, and Filing No. 11, Resistance, filed by Richard D. Myers. Alan Pedersen appeared for Richard D. Myers and Elizabeth Callaghan appeared for Maureen Raynor.

In accordance with the Memorandum filed contemporaneously herewith,

IT IS ORDERED: The motion to dismiss the adversary proceeding (Fil. #8) is denied.

DATED: January 26, 2007

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
Alan Pedersen
*Elizabeth Callaghan
U.S. Trustee

* Movant (*) is responsible for giving notice to other parties if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

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|---|---|
| IN THE MATTER OF:<br>JOHN PATRICK RAYNOR,<br><br>Debtor(s). | CASE NO. BK04-83112<br>A06-8105<br><br>CH. 7 |
| RICHARD D. MYERS,<br>Trustee of the John P.<br>Raynor Chapter 7 Bankruptcy,<br><br>Plaintiff,<br><br>v.<br><br>MAUREEN RAYNOR,<br><br>Defendant. | |

MEMORANDUM

Hearing was held in Omaha, Nebraska, on December 21, 2006, regarding Filing No. 8, Motion to Dismiss Adversary Proceeding, filed by Maureen Raynor, and Filing No. 11, Resistance, filed by Richard D. Myers. Alan Pedersen appeared for Richard D. Myers and Elizabeth Callaghan appeared for Maureen Raynor. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(F), (H) and (O).

On September 13, 2004, the Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code. An order for relief was entered September 13,

2004. The Trustee was appointed on June 3, 2005, on the date the case was converted to Chapter 7. The Trustee filed this adversary proceeding against the defendant, the purpose of which was to avoid alleged preferential transfers in violation of § 547 of the Bankruptcy Code, to avoid certain other transfers pursuant to § 544 of the Code and the Nebraska Uniform Fraudulent Transfer Act, and to avoid unauthorized post-petition transfers. The complaint was filed on September 13, 2006.

The defendant has filed a motion to dismiss the adversary proceeding as untimely, on the theory that the applicable two-year statute of limitation accrued on September 13, 2004, the day the alleged causes of action accrued, that is, the petition date. The defendant asserts that the statute of limitation, 11 U.S.C. § 546(a) ran on September 12, 2006. Since the adversary complaint was filed one day after that date, on September 13, 2006, the defendant suggests that this court lacks jurisdiction and a dismissal with prejudice is warranted.

The statutory provision relied upon by the defendant is 11 U.S.C. § 546(a). It states:

> (a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of –
>
> (1) the later of –
>
> (A) 2 years after the entry of the order for relief; or

> (B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
>
> (2) the time the case is closed or dismissed.

The Trustee resists the motion to dismiss because it is his position that Federal Rule of Bankruptcy Procedure 9006(a) makes the complaint timely. Rule 9006(a), in relevant part, states:

> In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

Rule 9006(a) is basically the same as Federal Rule of Civil Procedure 6(a). If Rule 9006(a) is applicable to 11 U.S.C. § 546(a), the first date used for

calculating the statutory time limit would be September 14, 2004, the day following the petition date. The last date included in the two year limitations period would be September 13, 2006, the anniversary date of the petition filing. Bankruptcy courts, generally, have determined that Rule 9006(a) governs the computation of time on a period of time to take action as prescribed by an applicable statute, such as 11 U.S.C. § 546. *See Grella v. Zimmerman (in re Art & Co.)*, 179 B.R. 757, 762 (Bankr. D. Mass. 1995) (stating "the vast majority of courts has [sic] ruled that, in light of the language of Fed. R. Bankr. P. 9006(a), the date of the trustee's appointment should not be counted in computing the statute of limitations under section 546(a)"); *Callahan v. Moore (In re Gen. Creations, Inc.)*, 343 B.R. 548 (Bankr. W.D. Va. 2006); *S. Tech. Coll. v. Ark. Television Co. (In re S. Tech. Coll., Inc.)*, 172 B.R. 253 (Bankr. E.D. Ark. 1994); *Boatman v. Furnia (In re Sutera)*, 157 B.R. 519 (Bankr. D. Conn. 1993); *Amdura Corp. v. Faegre & Benson (In re Amdura Corp.)*, 142 B.R. 433 (Bankr. D. Col. 1992); *Zimmerman v. Nat'l Elec. Benefit Fund (In re Kaelin Assoc. Elec. Constr., Inc.)*, 70 B.R. 412 (Bankr. E.D. Pa. 1987); *Judson v. Int'l Terminal Operating Co. (In re Oro Import Co.)*, 69 B.R. 6 (S.D. Fla. 1986); *Salomon v. Pan Am. World Airways, Inc. (In re Black & Geddes, Inc.)*, 35 B.R. 827 (Bankr. S.D.N.Y. 1983).

However, the Court of Appeals for the Sixth Circuit, when faced with the specific question presented in this case, held that the two year time period

begins to run as of the date of the Trustee's appointment. It found that § 546(a) was "jurisdictional" and that Rule 9006(a) could not be used to extend the jurisdictional grant provided by the statute. The Circuit Court in *Martin v. First Nat'l Bank of Louisville (In re Butcher),* 829 F.2d 596 (6th Cir. 1987), followed its own earlier decision in *Rust v. Quality Car Corral, Inc.,* 614 F.2d 1118 (6th Cir. 1980), which dealt with the application of Civil Rule 6(a). However, the refusal of the Court to apply Rule 9006(a) and Civil Rule 6(a) in *Butcher* and *Rust* was specifically overruled by the Sixth Circuit sitting *en banc* in *Bartlik v. U.S. Department of Labor,* 62 F.3d 163, 166 (6th Cir. 1995). In *Bartlik,* the Sixth Circuit determined that, contrary to its prior decisions, it now conceptualizes Civil Rule 6(a) as merely providing a method of computing time, and not as expanding or extending a statute of limitations.

The Sixth Circuit's reexamination of the applicability of Civil Rule 6(a) is significant because the Eighth Circuit Court of Appeals relied upon *Rust v. Quality Car Corral, Inc.,* when it determined in *Mattson v. U.S. West Communications, Inc.,* 967 F.2d 259 (8th Cir. 1992), that under the Fair Debt Collection Practices Act, for a court to have jurisdiction, the complaint must be filed on the day prior to the anniversary of the date of mailing, which, by analogy to this adversary proceeding, would be the day before the anniversary of the bankruptcy petition filing date. *Mattson,* itself, was somewhat inconsistent with a prior Eighth Circuit decision, *McDuffee v. United*

*States,* 769 F.2d 492, 494 (8th Cir. 1985), which cited with approval other courts that had applied Civil Rule 6(a) to federal statutes of limitations. More recently, in *Moore v. United States,* 173 F.3d 1131 (8th Cir. 1999), the Eighth Circuit Court of Appeals, when interpreting the Anti-terrorism and Effective Death Penalty Act's (AEDP) one year time limit for filing motions to set aside or vacate sentences, determined that the AEDP is a statute of limitations, not a jurisdictional bar, and therefore a motion for post-conviction relief had to be filed no later than the anniversary date of the effective date of the statute, not one day prior to the anniversary date. The court stated:

> We declined to apply Rule 6(a) in *Mattson* because the statute of limitations in the FDCPA was jurisdictional, and Fed. R. Civ. P. 82 prevents the use of the Rules of Civil Procedure to extend the jurisdiction of district courts. Thus, before determining whether we should apply Rule 6(a) to the one-year time limit in § 2255, we must first determine whether that time limit is jurisdictional.

173 F.3d at 1134. The court determined that the time limit under that statute was not jurisdictional and did apply Rule 6(a) to begin the computation of time one day after the effective date of the enactment of the statute.

Analogously, it would appear that if the Eighth Circuit Court of Appeals had before it the question of whether Rule 9006(a) should be applied to 11 U.S.C.

§ 546(a), it would first determine whether § 546(a) was jurisdictional or, alternatively, simply a statute of limitations. If it determined the statute was not jurisdictional, the counting would start per Rule 9006(a) on the day following the date the petition was filed, and end on the anniversary date of the petition filing.

Congress seems to have been more helpful with regard to whether § 546(a) is jurisdictional than it was with regard to other statutory provisions which have been interpreted by the courts. Section 546(a) was amended in 1994 by Public Law 103-394, the Bankruptcy Reform Act of 1994. In the section-by-section analysis in the legislative history, Section 216, the applicable amendment to the limitation of avoiding powers, the House Report discussing the amendment states:

> This section clarifies section 546(a)(1) of the Bankruptcy Code which imposes a 2-year statute of limitations within which an appointed trustee must bring an avoidance action. The purpose of a statute of limitations is to define the period of time that a party is at risk of suit. This section defines the applicable statute of limitations as 2 years from the entry of an order of relief or 1 year after the appointment of the first trustee if such appointment occurs before the expiration of the original 2-year period. **The section is not intended to affect the validity of any tolling agreement or to have any bearing on the equitable tolling doctrine where there has been fraud determined**

> **to have occurred. The time limits are not intended to be jurisdictional and can be extended by stipulation between the necessary parties to the action or proceeding.** (Emphasis added.)

Based upon the statutory interpretation procedure identified as appropriate by the Eighth Circuit Court of Appeals, and based upon the expressed Congressional intent that 11 U.S.C. § 546(a)(1) is not jurisdictional, Rule 9006(a) is properly applied in the computation of time that the Trustee must abide by when bringing an avoidance action. In this case, Rule 9006(a) would permit the Trustee to begin the count on the day following the petition date and end the count on the anniversary date of the petition filing. Following that counting procedure, the Trustee's filing of the complaint on September 13, 2006, is timely. Therefore, the motion to disdismiss is denied. A separate order will be entered.

DATED: January 26, 2007 BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

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Alan Pedersen
*Elizabeth Callaghan
U.S. Trustee

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